Aras Jalinan Sdn Bhd v Tipco Asphalt Public Co Ltd & Ors

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–643 OF 2008, W-02–644 OF 2008, W-02–645 OF 2008 AND W-02–646 OF 2008

B

SURIYADI, KN SEGARA AND RAMLY ALI JJCA
11 JANUARY 2011

C

Civil Procedure — Amendment — Petition under s 181 of the Companies Act 1965 — Application dismissed — Appeal — Whether order to amend ought to be granted

D

Civil Procedure — Striking out — Petition under s 181 of the Companies Act 1965 — Appeal against order — Whether appellant's allegations obviously unsustainable — Rules of the High Court 1980 O 18 r 19

E

The appellant, a private limited company incorporated in Malaysia, and the first and second respondents, public limited companies incorporated in Thailand, were partners in a joint venture to carry on the business of bitumen or asphalt processing. The joint venture was carried out through Kemaman Bitumen Co Sdn Bhd ('KBC'), a company incorporated in Malaysia to process bitumen or asphalt. The eighth respondent, the joint venture company, had a 94% stake in KBC. The appellant claimed that the affairs of the eighth respondent were conducted in a manner oppressive to the appellant or in disregard of the appellant's interests as a member of the eighth respondent. The appellant also claimed that the third to sixth respondents, as nominees of the first and second respondents on the board of the eighth respondent, together with the seventh respondent, a chief executive officer of KBC, had also carried out oppressive acts against the appellant. The appellant thus filed a petition under s 181 of the Companies Act 1965('the Act') and named the eight respondents as parties to the petition. It was the appellant's case that the first and second respondents had acted contrary to the appellant's interest and attempted to defeat the intention and purpose of the joint venture as a whole. The first to seventh respondents filed separate applications under O 18 r 19 of the Rules of the High Court 1980, to strike out the appellant's petition. At the same time the appellant filed an application to amend its petition. The proposed amendments by the appellant were essentially to clarify its case against the third to seventh respondents. Both the striking out applications and the application to amend were heard on the same day. The High Court allowed the respondents' applications to strike out the petition and dismissed the

F

G

H

I

appellant's application to amend the petition. These were the appellant's appeals against those decisions.

Held, allowing all the appeals with fixed costs as ordered:

(1) Where an application to strike out a s 181 petition was made by the respondents, it was not incumbent upon the appellant/petitioner, who was resisting the application, to adduce evidence that oppression had indeed been occasioned by the majority. The respondents' applications to strike out the petition had to fail, if the facts set out in the petition led to an irresistible inference of oppression and/or some unconscionable or inequitable conduct by the majority in the affairs of the company, thereby requiring the court to grant some appropriate remedy or order under s 181 of the Act. This court found that the facts and allegations as set out in the appellant's petition, together with the proposed new paragraphs to be added by way of the appellant's application to amend, would clearly bring the petition within the ambit of one which was not 'obviously unsustainable' in the context of s 181 of the Act. The appellant's petition was thus reinstated to be heard on its merits (see para 7).

(2) The remedy under s 181 of the Act was a statutory remedy. The appellant could not be derived of this remedy by reason of having resorted to arbitration proceedings, interim injunctions and/or calling for an extraordinary general meeting (see para 8).

(3) The High Court had erred in not considering the appellant's application to amend the petition. The proposed amendments were clearly to show that the conduct of the first and second respondents and the third to seventh respondents warranted the intervention of the court under s 181 of the Act. As such the High Court ought to have permitted the amendments to the petition as sought by the appellant (see para 15).

(4) In allowing the appeals against the striking out applications the court ordered the first and second respondents to pay costs in the sum of RM60,000, the third to sixth respondents to pay costs in the sum of RM15,000 and the seventh respondent to pay costs in the sum of RM15,000 (see para 16).

(5) In allowing the appeal dismissing the appellant's application to amend its petition, the court fixed costs at RM15,000 (see para 16).

[Bahasa Malaysia summary

Perayu, syarikat sendirian berhad yang diperbadankan di Malaysia, dan responden-responden pertama dan kedua syarikat-syarikat awam berhad yang diperbadankan di Thailand, merupakan rakan kongsi dalam usahasama untuk menjalankan perniagaan pemprosesan bitumen atau asfalt. Usahasama itu

dijalankan melalui Kemaman Bitumen Co Sdn Bhd ('KBC'), sebuah syarikat yang diperbadankan di Malaysia untuk memproses bitumen atau asfalt. Responden kelapan, syarikat usahasama itu, mempunyai pegangan 94% dalam KBC. Perayu mendakwa bahawa urusan responden kelapan telah dijalankan secara menindas terhadap perayu atau tidak menghiraukan kepentingan perayu sebagai ahli kepada responden kelapan. Perayu juga mendakwa bahawa responden-responden ketiga hingga keenam, sebagai calon-calon kepada responden-responden pertama dan kedua pada lembaga responden kelapan, bersama responden ketujuh, ketua pegawai eksekutif KBC, juga telah melakukan tindakan menindas terhadap perayu. Perayu dengan itu telah memfailkan petisyen di bawah s 181 Akta Syarikat 1965 ('Akta tersebut') dan menamakan kelapan-lapan responden sebagai pihak-pihak kepada petisyen itu. Adalah kes perayu bahawa responden-responden pertama dan kedua telah bertindak bertentangan dengan kepentingan perayu dan cuba menggagalkan niat dan tujuan usahasama secara keseluruhan. Responden-responden pertama hingga ketujuh telah memfailkan permohonan-permohonan berasingan di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980, untuk membatalkan petisyen perayu. Pada masa sama perayu telah memfailkan permohonan untuk meminda petisyennya. Cadangan pindaan oleh perayu khususnya adalah untuk menjelaskan kesnya terhadap responden-responden ketiga hingga ketujuh. Kedua-dua permohonan pembatalan dan permohonan untuk meminda telah didengar pada hari yang sama. Mahkamah Tinggi telah membenarkan permohonan-permohonan responden-responden untuk membatalkan petisyen tersebut dan menolak permohonan perayu untuk meminda petisyen tersebut. Berikut adalah rayuan perayu terhadap keputusan tersebut.

Diputuskan, membenarkan semua rayuan dengan kos tetap sepertimana diperintahkan:

(1) Di mana permohonan untuk membatalkan petisyen s 181 telah dibuat oleh responden-responden, adalah tidak menjadi kewajipan ke atas perayu/pempetisyen, yang menentang permohonan tersebut, untuk mengemukakan keterangan bahawa penindasan sememangnya berlaku oleh pihak majoriti. Permohonan-permohonan responden-responden untuk membatalkan petisyen hendaklah gagal, jika fakta yang dinyatakan dalam petisyen membawa kepada inferens penindasan dan/atau perlakuan tidak berpatutan atau tidak saksama oleh pihak majoriti dalam urusan syarikat, yang mana memerlukan mahkamah memberikan remedi atau perintah yang sesuai di bawah s 181 Akta tersebut. Mahkamah ini mendapati bahawa fakta dan dakwaan yang dinyatakan dalam petisyen perayu, bersama dengan cadangan perenggan baru untuk ditambah melalui permohonan untuk meminda perayu, jelas menjadikan petisyen tersebut di bawah skop 'obviously unsustainable'

dalam konteks s 181 Akta tersebut. Petisyen perayu dengan itu dikembalikan untuk didengar atas meritnya (lihat perenggan 7).

(2) Remedi di bawah s 181 Akta tersebut adalah remedi statutori. Perayu tidak boleh memperoleh remedi ini dengan alasan telah merujuk kepada prosiding timbangtara, injunksi interim dan/atau memanggil mesyuarat am luar biasa (lihat perenggan 8).

(3) Mahkamah Tinggi terkhilaf kerana tidak mengambil kira permohonan perayu untuk meminda petisyen tersebut. Cadangan pindaan jelas menunjukkan bahawa perlakuan responden-repsonden pertama dan kedua dan responden-repsonden ketiga hingga ketujuh mewajarkan campur tangan mahkamah di bawah s 181 Akta tersebut. Oleh itu Mahkamah Tinggi patut membenarkan pindaan-pindaan kepada petisyen tersebut sepertimana dipohon oleh perayu (lihat perenggan 15).

(4) Dengan membenarkan rayuan-rayuan terhadap permohonan-permohonan pembatalan mahkamah memerintahkan responden-responden pertama dan kedua membayar kos berjumlah RM60,000, responden-responden ketiga hingga ketujuh membayar kos berjumlah RM15,000 dan responden ketujuh membayar kos berjumlah RM15,000 (lihat perenggan 16).

(5) Dengan membenarkan rayuan tersebut menolak permohonan perayu untuk meminda petisyennya, mahkamah menetapkan kos berjumlah RM15,000 (lihat perenggan 16).]

Notes:

For cases on amendment in general, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 553–560.

For cases on striking out in general, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7425–7635.

Notes:

For cases on dismissal, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 948–1000.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Legislation referred to

Companies Act 1965 s 181
Rules of the High Court 1980 O 18 r 19

Appeal from: Originating Petition No D3–36–32 of 2008 (High Court, Kuala Lumpur)

(Shearn Delamore & Co) for the appellant.
(Skrine), (Sreenevasan Young) and (Lim Kian Leong & Co) for the respondents.

KN Segara JCA (delivering judgment of the court):

[1] The appellant before us (Aras Jalinan Sdn Bhd) filed a petition under s 181 of the Companies Act 1965 in the High Court and named eight respondents as parties to the petition. The first to seventh respondents, thereafter, filed separate applications to strike out the petition under O 18 r 19 of the Rules of the High Court 1980 and, the High Court allowed the applications.

[2] The appellant had filed an application to amend its petition but this application was dismissed by the High Court on the same day the respondents' applications to strike out the petition were allowed.

[3] Aras Jalinan Sdn Bhd's (AJSB's) present appeals before us are against the striking out of the s 181 of the Companies Act 1965. Petition ('s 181 petition') as well as the dismissal of its application to amend its petition.

[4] We had no hesitation in allowing the appeals, namely:

(a) Appeal No W-02–643 of 2008, the High Court's decision allowing the first and second respondents' striking out application;

(b) Appeal No W-02–644 of 2008, the High Court's decision allowing the third to sixth respondents' striking out application;

(c) Appeal No W-02–645 of 2008, the High Court's decision allowing the seventh respondent's striking out application; and

(d) Appeal No W-02–646 of 2008, the High Court's decision dismissing the appellant's application to amend its petition.

[5] There is no dearth of authorities on the principles for striking out pursuant to O 18 r 19 of the Rules of High Court 1980. In *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd.* [1993] 3 MLJ 36, the Supreme Court observed:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd*), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v L 7 NW Rly Co*) …

[6] A striking out application is not a trial on affidavits. It is not an application where the parties have to adduce evidence to establish the merits of their case. The court should not conduct a minute examination of the documents and the facts of the case. So long as the claim discloses some cause of action or raises some question fit to be tried it should not be struck out. The mere fact the case is weak and not likely to succeed is no ground for the pleadings to be struck out. If necessary, appropriate amendments to the pleadings should be granted or directed and the case ordered to proceed to trial, on its merits.

[7] Where an application to strike out a s 181 petition is made by the respondent/s, it is not incumbent upon the petitioner who is resisting the application to adduce *evidence* that oppression has indeed been occasioned by the majority. We are unanimous that the application of the respondent/s to strike out the petition must fail if the facts set out in the petition irresistibly lead to an inference of oppression and/or of some unconscionable/inequitable conduct by the majority in the affairs of the company, requiring the court to grant some appropriate remedy and/or orders under the provisions of s 181 of the Companies Act, a' fortiori, if the affidavit filed by the petitioner to resist the application supports or verifies the facts set out in the petition, as manifested in the affidavit of Ruziah bt Mohd Amin, a director of the petitioner, dated 24 April 2008. Indeed, we are satisfied that the facts and allegations set out in the 68 paragraph petition (together with the three proposed *new* paras 65–68, alluded to later in this judgment vide the application for amendment of the petition) clearly brings the petition within the ambit of one which is *not* 'obviously unsustainable' in the context of a s 181 petition.

[8] The s 181 of the Companies Act remedy is a *statutory* remedy. The petitioner cannot be deprived of this statutory remedy nor denied of it by reason of the petitioner having resorted to resolving some of the issues, forming the basis of the petition, in arbitration proceedings, and/or any unsuccessful applications in a civil court for interim injunctions to prevent the holding and/or calling of an extraordinary general meeting of the company to appoint new nominee directors by the first and second respondent, on the board of the eighth respondent, pending the outcome of arbitration proceedings.

[9] Briefly, the appellant/petitioner (AJSB) is a private limited company incorporated in Malaysia. The first respondent, Tipco Asphalt Public Co Ltd (TASCO) and the second respondent, Thai Bitumen Co Ltd (TBC) are public limited companies incorporated in Thailand. The third respondent, Thiery Alan Simon Defrene and the fifth respondent, Jacques Marcel Pastor are French nationals with addresses in Thailand. The fourth respondent, Somchit Sertthin and the sixth respondent, Chaiwat Srivalwat are Thai nationals with addresses in Thailand too. The seventh respondent, Abdul Malik Tahir is a

Malaysian national with an address in Selangor. The eighth respondent, Kemaman Oil Corporation Sdn Bhd (KOC), is a private limited company incorporated in Malaysia.

[10] Some of the salient facts gathered from the petition are as follows.

(a) Kemaman Bitumen Company Sdn Bhd is a company incorporated to process bitumen/asphalt.

(b) KOC (the eighth respondent) is an investment holding company. It is a joint venture company. The third to sixth respondents are nominees on the Board of KOC (the eighth respondent).

(c) KOC's sole asset is a 94% stake in Kemaman Bitumen Company Sdn Bhd. The seventh respondent is the chief executive officer of Kemaman Bitumen Company Sdn Bhd (KBC).

(d) On 13 July 2004, TASCO (the first respondent) and TBC (the second respondent) entered into a shareholders' agreement with Seloga Holdings Bhd. The shareholders' agreement was a joint venture to construct and commission a bitumen/asphalt plant and to produce and carry out the business of bitumen/asphalt.

(e) The joint venture was carried out through Kemaman Bitumen Company Sdn Bhd, a company incorporated to process bitumen/asphalt.

(f) TASCO (the first respondent), TBC (the second respondent) and Seloga Holdings Bhd agreed to jointly participate in the share capital of KOC (the eighth respondent) which would hold not less than 93.2% of the issued and paid-up capital of Kemaman Bitumen Company Sdn Bhd.

(g) KOC (the eighth respondent) has an authorised share capital of RM250,700,000 divided into:

  (i) 150,000,000 ordinary shares of RM1 each;

  (ii) 31,350,000 non-redeemable convertible 'A' preference shares of RM1 each;

  (iii) 38,000,000 redeemable convertible preference shares of RM1 each ('B RCPS'); and

  (iv) 31,350,000 redeemable convertible preference shares of RM1 each ('C RCPS').

(h) On 11 January 2008, Seloga Holdings Bhd, TASCO (the first respondent), TBC (the second respondent), AJSB (the appellant), KOC (the eighth respondent), and Kemaman Bitumen Company Sdn Bhd entered into three agreements, to settle issues that had arisen particularly

between Seloga Holdings Bhd, TASCO(the first respondent) and TBC (the second respondent), namely:

(i) Seloga Holdings Bhd, TASCO (the first respondent) and TBC (the second respondent) entered into a settlement agreement for, inter alia, Seloga Holdings Bhd to sell to TBC (the second respondent) all its 950,001 shares to KOC (the eighth respondent);

(ii) AJSB (the appellant), TASCO (the first respondent), TBC (the second respondent) and KOC (the eighth respondent) entered into a settlement agreement ('Settlement Agreement'). The main purpose of the settlement agreement is for AJSB (appellant) to acquire and own 50% of the shares of KOC (the eighth respondent) with TASCO (the first respondent) and TBC (the second respondent) owning the other 50% and to have the same management participation and control of KOC (the eighth respondent) as enjoyed by TASCO (the first respondent) and TBC (the second respondent); and

(iii) TASCO (the first respondent), TBC (the second respondent), KOC (the eighth respondent), Kemaman Bitumen Company Sdn Bhd, AJSB (the appellant) and Seloga Holdings Bhd entered into a first cargo settlement agreement ('First Cargo Settlement Agreement') to manage a debt owed by KOC (the eighth respondent) to TASCO (the first respondent) arising from the supply of crude oil by TASCO (the first respondent) to KOC (the eighth respondent).

[11] The settlement agreement is also, in essence, a joint venture between AJSB (the appellant) of the one part and TASCO (the first respondent) and TBC (the second respondent) of the other part. As such, the said joint venture partners owe one another fiduciary duties over and above their contractual obligations stipulated in the settlement agreement. These duties include the duty not to act in a manner contrary to the interest of the other joint venture partners and a duty not to defeat the intention and purpose of the joint venture, as a whole.

[12] AJSB's (appellant's) cost to acquire 50% of KOC (the eighth respondent) shares is in excess of RM63m. The settlement agreement provides for the payments and the transfers of shares in stages as follows:

(i) RM19,000,000 to be paid by AJSB (the appellant) to KOC (the eighth respondent) on 11 January 2008;

(ii) AJSB (the appellant) to transfer all shares in Multi Strategies Sdn Bhd to AJSB (the appellant) upon signing the settlement agreement;

(iii) AJSB (the appellant) is to convert 24,700,000 C RCPS of KOC (the eighth respondent) held by Multi Strategies Sdn Bhd into new ordinary shares of KOC (the eighth respondent) upon conversion of 31,350,000 B RCPS of KOC (the eighth respondent) into new fully paid-up ordinary shares of KOC (the eighth respondent) and upon registration of AJSB (the appellant) as the sole shareholder of Multi Strategies Sdn Bhd;

(iv) RM5,000,000 to be paid by AJSB (the appellant) to KOC (the eighth respondent) on or before 28 February 2008;

(v) RM7,350,000 to be paid by AJSB (the appellant) to KOC (the eighth respondent) on or before 31 March 2008;

(vi) RM950,001 to be paid by AJSB (the appellant) for the purchase of ordinary shares from TBC (the second respondent) on or before 31 March 2008; and

(vii) RM6,650,000 to be paid by AJSB (the appellant) for the purchase of ordinary shares from TBC (the second respondent) on or before 31 March 2008.

[13] We are unanimous that the appellant's petition is not *obviously unsustainable*. A scrutiny at some relevant paragraphs of the Petition speaks for itself and leaves no room for any serious doubts. They read as follows:

(D) PETITIONER'S COMPLAINTS

16. The Petitioner states as follows:

(a) KOC's affairs are being conducted in a manner oppressive to AJSB or in disregard of AJSB's interests as a member of KOC;

(b) the powers of the 3rd to 6th Respondents namely the nominees of TASCO and TBC on the Board of Directors of KOC are being exercised in a manner oppressive to AJSB or in disregard of AJSB's interests as a member of KOC;

(c) acts of KOC have been done or threatened which unfairly discriminate against or are otherwise prejudicial to AJSB; and

(d) resolutions of the members of KOC are proposed which unfairly discriminate against or are otherwise prejudicial to AJSB.

17. Further, TASCO and TBC entered into the Settlement Agreement in bad faith. TASCO and TBC had no intention to implement the Settlement Agreement, but instead, merely used the Settlement Agreement as an instrument to secure funds from AJSB for the working capital requirements of KOC, and thereafter to take over the management and control of KOC.

18. In addition, TASCO and TBC have acted in breach of their fiduciary

duties owed to AJSB, and in particular have acted contrary to AJSB's interests and are attempting to defeat the intention and purpose of the joint venture as a whole.

19. …

(E) TASCO AND TBC's FIRST ATTEMPT TO PREVENT AJSB FROM ACHIEVING 50% SHAREHOLDING IN KOC AND EQUAL MANAGEMENT AND CONTROL OF KOC

20. AJSB complied with the first 3 stages set out in paragraphs 15 (a) to (c) above. The next stage as referred to in paragraph 15 (d) was the payment of RM5,000,000.00 on or before 28.2.2008.

21. Due to technical errors in the receipt and remittance of funds, the payment of RM5,000,000.00 was late by 2 working days. The payment was to be made on Thursday 28.2.2008, and was instead made on Monday 3.3.2008. In fact, on 28.2.2008,in demonstrating AJSB's intention to make the 2nd payment, Christine Tan Mai Yean from SHB had through Short Message System (SMS) informed Chua Kok Chuan, the Financial Officer of KBC, that AJSB was arranging for the said payment.

22. TASCO and TBC followed the progress of the payment arrangement but did not raise any objection to the delay. Instead, on 28.2.2008 Chayongsak Pisitpong from TASCO inquired from Chua Kok Chuan whether AJSB would make the payment on 29.2.2008. On the morning of 29.2.2008, Chua Kok Chuan inquired from Christine Tan Mai Yean as to when payment would be made. On 3.3.2008. Chayongsak Pisitpong asked Chua Kok Chuan to inform him upon confirmation of payment. AJSB did not receive any response to Christine Tan Mai Yean's SMS.

23. By letter dated 29.2.2008, TBC issued a notice to AJSB alleging that AJSB had breached Clause 4.1.1 of the Settlement Agreement and stating that TBC would exercise its rights under Clause 6.4 and 6.6 with respect to the management participation and control of KOC and KBC. Clause 6.4 and Clause 6.6 provide that:-

'…'

24. On the same day, TASCO and TBC's solicitors issued a Notice of Extraordinary General Meeting of KOC to be held on 14.3.2008 to appoint 4 further representatives of TASCO and TBC as Directors of KOC, which would give control and management of KOC and KBC to TASCO and TBC.

25. As the 2nd payment was made on 3.3.2008, AJSB requested that the Extraordinary General Meeting be cancelled. TASCO and TBC refused to do so.

26. By a letter dated 3.3.2008, TASCO directed KOC not to accept the payment of RM5,000,000.00 from AJSB as subscription monies, and not to issue share certificates to AJSB.

27. However, the Settlement Agreement does not provide for the forfeiture of AJSB's right to subscribe for 50% shareholding of KOC by reason of a mere 2 working days' delay in any one payment.

28. Furthermore, TASCO and TBC are not entitled to rely on Clause 6.4 and 6.6 of the Settlement Agreement to requisition for the Extraordinary General Meeting.

29. AJSB had until 31.3. 2008 to subscribe for its 50% shareholding in KOC, and the equal management participation and control of KOC was to remain at least until 31.3.2008. It is inconceivable for AJSB to pay a large sum of RM63,650,001.00 and hold 50% shares in KOC but not have the equal right of management participation and control of KOC and KBC.

30. As such …

31. The Settlement Agreement in any event does not allow TASCO and TBC to requisition for an Extraordinary General Meeting to appoint additional directors.

32. In a telephone

33. However …

(F) SETTLEMENT OF DISPUTE IN PAYMENT OF RM5,000.000.00

34. Clause 25 of the Settlement Agreement provides that the parties refer their disputes to arbitration in Singapore … Pursuant thereto, AJSB issued TASCO and TBC a notice on 11.3.2008 that it intends to refer the dispute to arbitration.

35. Pending the disposal of the arbitration, AJSB filed an Originating Summons No … on 12.3.2008, seeking injunctive relief to restrain TASCO and TBC from preventing AJSB from acquiring the 50% shares and to restrain TASCO and TBC from appointing new directors of KOC.

36. On the first hearing date on 13.3.2008, TASCO and TBC raised preliminary jurisdictional and procedural objections. In view of the preliminary objections raised by TASCO and TBC, the Court granted an ad interim injunction to preserve the status quo until disposal of the Originating Summons, … and fixed all preliminary objections for hearing on 21.3.2008. The EGM was then adjourned by TASCO and TBC to the next working day, i.e. 24.3.2008.

37. On 21.3.2008, after hearing the parties, the Court adjourned the matter for decision on 4.4.2008. The EGM was once again adjourned by TASCO and TBC to the next working day i.e. 7.4.2008.

38. On 4.4.2008 … the decision on the preliminary objections was adjourned to 7.4.2008. The EGM was then adjourned by TASCO and TBC to the following day, i.e. 8.4.2008.

39. On 7.4.2008, the Court allowed TASCO's and TBC's preliminary jurisdictional objection and consequently dismissed AJSB's Originating Summons with costs. Upon AJSB's oral application, the Court granted a limited Erinford injunction for 21 days to enable AJSB to apply to the

Court of Appeal for a fresh Erinford injunctionpending the disposal of AJSB's appeal against the decision of the High Court.

40. On 8.4.2008 …

41. In opposing AJSB's application for Erinford injunction in the High Court, TASCO and TBC's counsel suggested that TASCO and TBC may now accept the payment of RM5,000,000.00. This was contrary to TASCO's and TBC's position all along and shows bad faith. On 7.4.2008, TASCO and TBC withdrew the notice of EGM.

(G) SUBSEQUENT ATTEMPTS BY TASCO AND TBC TO PREVENT AJSB FROM ACHIEVING 50% SHAREHOLDING OF KOC WHICH WILL RESULT IN AJSB LOSING RIGHT OF EQUAL MANAGEMENT AND CONTROL OF KOC

12. After the Originating Summons had been filed by AJSB, TASCO and TBC continued in their attempts to prevent AJSB from acquiring parity with TASCO and TBC, i.e. 50% shareholding in KOC and equal management control. The details are as follows.

(H) UNWARRANTED REQUEST FOR SHAREHOLDERS' LOAN

43. On 25.3.2008, AJSB received a written request dated 19.3.2008 by courier from TASCO and TBC for a shareholders' loan of RM2,777,000.00 allegedly for KBC's benefit, to be advanced by AJSB before 24.3.2008 purportedly pursuant to Clause 4A.1 of the Settlement Agreement.

44. At the material time, there was the subscription sum of RM5,000,000.00 paid by AJSB to KOC on 3.3.2008. This sum is still in KOC and has not been used due to TASCO and TBC's objections. TASCO and TBC tried to reject this payment when it can and should have been used for KBC's benefit; instead they subsequently requested for the shareholders' loan.

45. TASCO and TBC failed to comply with the conditions precedent to the request under Clause 4A. In particular, KBC's financial needs should have firstly been satisfied by the subscription monies, and any further financing requirements of KBC should have been satisfied through commercial borrowings, failing which parties in good faith should have held discussions as to ways of raising alternative finance.

46. Further, the request for the shareholders' loan to be extended on or before 24.3.2008 was made in bad faith as the letter was only received by AJSB on 25.3.2008.

47. Despite the position taken by AJSB, TASCO and TBC proceeded to extend a sum of US$1,224,000.00 to KOC and purportedly invoke their rights in Clause 4A.6 for the monies extended to be subscription of new ordinary shares in KOC. Hence the end result was that TASCO and TBC tried to obtain new shares for themselves that would have upset the intended equal balance between the parties.

48. On 27.3.2008, TASCO and TBC caused to be issued a notice of a meeting of the Board of Directors of KOC to be held on 31.3.2008 for

the issuance of KOC shares to TASCO and TBC pursuant to the payment of the shareholders' loan to KOC. The proposed resolution was not carried because of the objections by AJSB's representatives.

(I) UNWARRANTED REQUEST FOR ACCELARATION OF PAYMENT OF RM7,350,000.00

49. On 25.3.2008, besides the request for the shareholder's loan, AJSB received another request from TASCO and TBC dated 19.3.2008 purportedly under Clause 4.2 of the Settlement Agreement, for an acceleration of the next payment of RM7.350,000.00 that was in fact only due on 31.3.2008. TASCO and TBC subsequently alleged by a letter dated 26.3.2008 that there was a claim by a creditor of KBC, Sunmatec Engineering & Construction Sdn Bhd ("Sumatec"), necessitating the request.

50. However, Tasco's and TBC's request is without basis. The conditions precedent

51. …

52. …

54. …

(J) UNWARRANTED EXERCISE OF CALL OPTION

55. On 8.12.2006, KOC entered into a crude supply agreement with TASCO whereby TASCO agreed to supply crude oil to KOC ("Crude Supply Agreement"). Pursuant to the Crude Supply Agreement, crude oil was supplied by TASCO to KOC for the purchase of US$21,102,514.12.

56. The First Cargo Settlement Agreement provides that in the event KOC fails to settle the US$21,102,614.12 together with the late payment penalty to TASCO on or before 31.3.2008, TASCO shall have the right to subscribe for ordinary shares in KOC at par value. The number of shares shall be equivalent to the value of the outstanding sum or part thereof still due and owing.

57. However, TASCO and TBC have unjustifiably tried to exercise the Call Option under the First Cargo Settlement Agreement on the purported basis that the sum was not paid to them by 31.3.2008, with the intent of procuring the issuance of fresh KOC shares in their favour so as to once again upset the 50:50 shareholding position.

58. TASCO's and TBC's attempt to exercise the Call Option is without basis for inter alia the following reasons:-

(K) REMAINING TERMS OF SETTLEMENT AGREEMENT IN PURCHASE OF SHARES BY AJSB FROM TBC

60.

61. …

(a) AJSB has sufficient funds to purchase the shares from TBC and has every intention of meeting its obligations and achieving the 50:50 shareholding position.

(b) However, in view of TASCO's and TBC's breaches of the Settlement Agreement which were intended to prevent AJSB from achieving the 50:50 shareholding position, AJSB would refrain from paying TBC for the shares until TASCO and TBC had rectified their breaches.

(L) MALA FIDE

62. AJSB's intention to make the Settlement Agreement a success in subscribing for 50% shareholding in KOC is clear as stated above. To-date, AJSB has paid RM31,350,000.00, transferred all shares in …

63. …

64. TASCO and TBC's actions in wrongfully preventing AJSB from achieving 50% shareholding in KOC are in bad faith. TASCO and TBC's intention to obstruct the joint venture is clear.

[14] We are unanimous that the High Court had erred in not considering the petitioner's application to amend the petition as set out in the proposed draft amended petition underlined in red. The judicial commissioner had dismissed the said application to amend only by reason of the fact that she had decided to strike out the petition under the O 18 r 19 applications made by the respondents.

[15] The proposed amendments by the petitioner were essentially to set out particulars against the third to the seventh respondents which had been left out and to plead its case against the third to seventh respondents, and clarify the issues. It was clearly to show that the conduct of TASCO, TBC and the third to seventh respondents warrants the intervention of the court under s 181 of the Companies Act 1965. We are satisfied the amendments, as suggested, were made bona fide and would not prejudice the respondents in anyway. The High Court should have permitted or directed the amendments to the petition sought by the petitioner. The primary amendments were to include *new* paras 65 and 66 which read as follows:

65. The 3rd to 6th Respondents are nominees of the 1st and 2nd Respondents on the Board of KOC. The acts of the 1st and 2nd Respondents as stated above are carried out through these nominees. The 3rd to 6th Respondents have also in their own right carried out oppressive acts against the Petitioner. Inter alia, the oppressive acts of the 3rd to 6th Respondents (which are also oppressive acts of the 1st and 2nd Respondents) are pleaded in paragraphs 16 to 18. 23 to 26. 33. 41 to 54. 57 to 59. 63 and 64 above, and include:-

(a) acts in paragraphs 32 and 33 above carried out by the 4th Respondent:

(b) acts in paragraphs 43 above carried out by the 6th Respondent;

(c) acts in paragraph 59 and 64 carried out bv the 3rd to 6th Respondents;

(d) all Board of Directors' meetings and EGMs of KOC attended bv the 3rd to 6th Respondents; and

(e) with reference to paragraph 58(a) above, 2 of the 3

66. The 7th Respondent facilitated the acts of the 1st to 6th Respondents as pleaded hereinbefore. In particular, the 7th Respondent did the following:-

(a) With reference to paragraph 26 above, the letter dated 3.3.2008 was issued bv the 1st Respondent to KOC for the attention of the 7th Respondent (who holds no position in KOC), directing the 7th Respondent not to accept the RM5 million paid bv the Petitioner as subscription monies, not to issue share certificates for 5 million new ordinary shares, and to provide the 1st Respondent with his written undertaking to comply with the demands within 7 days. By a letter dated 4.3.2008. the 7th Respondent held himself out as the Chief Executive Officer of KOC and informed the 1st Respondent that he would not take any action with respect to the RM5 million. Bv this action, the Respondent tried to ensure that the RM5 million would not be accepted bv KOC and share certificates would not be issued to the Petitioner, as desired bv 1st to 6th Respondents.

(b) With reference to paragraphs 43 to 48 above, on 19.3.2008. the 7th Respondent issued 2 letters on behalf of KBC to KOC asking for a shareholders' loan without basis. The 7th Respondent's conduct was to facilitate the oppressive acts of 1st and 2nd Respondents.

(c) With reference to paragraphs 55 to 59 above, on 2.4.2008. the 7th Respondent issued a letter purportedly as the Chief Executive Officer on behalf of KOC to the 1st Respondent confirming that an amount of US$4.828.967.46 is payable bv KOC to the 1st Respondent. even though he holds no position in KOC. This amount is not due to the 1st Respondent.

[16] In the above circumstances, we allow all the appeals before us with costs, fixed as follows:

(a) Appeal No W-02–643 of 2008, the High Court's decision allowing the first and second respondents' striking-out application, in the sum of RM60,000;

(b) Appeal No W-02–644 of 2008, the High Court's decision allowing the third to sixth respondents' striking-out application, in the sum of RM15,000;

(c) Appeal No W-02–645 of 2008, the High Court's decision allowing the seventh respondent's striking-out application, in the sum of RM 15,000; and

(d) Appeal No W-02–646 of 2008, the High Court's decision dismissing the appellant's application to amend its petition, in the sum of RM15,000.

[17] All orders of the High Court are set aside. The s 181 petition is re-instated and is to be heard in the High Court on its merits.

[18] Deposits refunded to appellant.

Appeals allowed with fixed costs as ordered.

Reported by Kohila Nesan